advantage over his fellows. They restrain themselves, believing, rightly or wrongly, that such restraint is essential to the good health of the profession as a whole; he gets the benefit of their restraint and fills his purse at their expense. He is defaulting on the obligation, by which explicitly or impliedly he undertook to be bound when they made him of their company. Such conduct could be thought disgraceful not merely by those of the profession but by outsiders who were not themselves bound by the same standards."

For the specific legal interpretation of terms similar to those used in section 9(1)(b) of our Ordinance, Lord Jenkins, delivering the judgment of the Privy Council in *Felix* v. *General Dental Council* (5) said:

"To make good a charge of "infamous or disgraceful conduct in a professional respect' . . . . there must in their Lordship's opinion (generally speaking) be some element of moral turpitude or fraud or dishonesty in the conduct complained of . . ."

In the same case it was also said as follows:

"The Lordships would add that the question whether in relation to a given matter a dentist has been guilty of infamous or disgraceful conduct is in their opinion a question of mixed fact and law, the question of law being whether on the facts proved or admitted the dentist has been guilty of infamous or disgraceful conduct . . ."

Where, as in the present case, the facts proved plainly showed that the appellants had so conducted themselves as to perpetrate a fraud on the public as well as on the entire professional body of architects, the question is no longer one of seeking to draw a line in a doubtful case which might very well have fallen on one side or the other of such line. The facts being clear, all that remained was a question of law. In both the cases of *Hughes* and *Felix*, just cited, the court had felt at liberty to disagree with the determination of such question by the Architects Registration Council and the General Dental Council. The converse should hold good as well. If the facts proved justify a determination of "infamous conduct in a professional respect", then this court is equally free to say so, even though the term "misconduct" had been omitted so long as there was no other irregularity of such serious proportions as to amount to a denial of natural justice.

I would dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Singh & Co.; Skrine & Co.*

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## NACHIAPPIN v. LAKSHMI AMMAL

**[A.C.J. (Raja Azlan Shah J.) March 21, 1966]**

**[K.L. — Civil Appeal No. 18 of 1965]**

*Landlord and Tenant — Dilapidations — Landlord alleging that tenant had left premises in an untenant-like manner — Implied term of tenancy.*

*Evidence — Photographs — Admissibility of — Objection to.*

The appellant was the tenant of premises let to him by the respondent. The respondent had obtained damages in an action in which she alleged that the appellant had left the premises in an untenant-like manner and thereby put the respondent to expense to recondition it. On appeal it was argued *inter alia* (1) that the facts did not justify the decision of the learned magistrate (2) that the learned magistrate erred in law in admitting certain photographs as evidence without the production of the originals (3) that there was no specific finding by the learned magistrate of an express obligation to repair and (4) that the learned magistrate had no jurisdiction to adjudicate upon the case as it involved a question of title.

**Held:** (1) the onus was on the appellant to show that the learned magistrate's evaluation of the evidence was wrong and in this case it had not been proved that there was such an error on the face of the record;

(2) as the photographs had been admitted at the trial without objection by the parties and their counsel, it was not possible for the appellant to complain at the appeal of the mode of proof;

(3) there is an implied obligation on the part of the appellant to use the premises in a tenant-like manner and his failure to do so amounted to a breach of the obligation;

(4) there was no question of title involved in this case, as the premises belonged to the respondent but she allowed it to be managed by her husband.

*Cases referred to:—*

(1) *Tay Theng Hung* v. *Heap Moh Steamship Co.* [1964] M.L.J. 87, 92.

(2) *Gopal Das* v. *Sri Thakurgi* A.I.R. 1943 P.C. 83 at p. 87.

(3) *Suppiah* v. *Ponnampalam* [1963] M.L.J. 202 at p. 203.

(4) *Ferguson* v. *Anon* 170 E.R. 465.

(5) *Marsden* v. *Edward Heyes Ltd.* [1927] 2 K.B. 1.

(6) *Horsefall* v. *Mather* 171 E.R. 141.

CIVIL APPEAL.

*L. Kandan* for the appellant.

*K. Sothinathan* for the respondent.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** This is an appeal from a decision of the learned magistrate sitting in Kuala Lumpur. The appellant was a tenant of the respondent at a monthly rent of $130. At the end of the tenancy the appellant left the said premises in an untenant-like manner and thereby put the respondent to expense to re-condition it. The respondent brought an action in the lower court to recover a sum of $350 being expenses incurred to repair the damage done to the said premises. It was never adumbrated either in the court below or before me that the sum was unreasonable. She succeeded in her claim. The appellant has now appealed against that decision.

The decision has been criticised on a number of grounds. Of the various criticisms urged on behalf of the appellant only four are of outstanding interest. In the first place it was urged that the facts did not justify the decision. I do not propose to go at any length into the facts

of this case which have been so completely set out by the learned trial magistrate in her judgment. The learned magistrate found that the premises consisted of three bedrooms and a kitchen and that it belonged to the respondent but her husband was managing it. It was the husband who had issued receipts in respect of rents. Before the appellant moved into the house it was painted and was in good condition. It was rented out at $130 per month. The appellant kept the said premises in a very bad condition. In early June 1964 the appellant was given notice to quit and he did so at the end of June. Before the appellant left the said premises the respondent's husband went to inspect it. He found it in a condition unfit for human habitation. The walls had been scratched with charcoal and in one of the three bedrooms which had been used as a kitchen there were smoke patches and it was covered with charcoal and ashes. In that state of the evidence and from an examination of the photographs the learned magistrate came to a definite finding of fact that damage was done to the said premises and that it could not have been caused by the respondent's children aged 8 and 10 years as alleged by the appellant or by the respondent herself to her own property. The learned magistrate disbelieved the appellant's story and concluded with these words: "(Appellant) in my opinion was just beating around the bush. He had in fact no defence to the claim. He gave evidence of matters which had nothing to do with the claim". Without doubt the learned magistrate had based her facts on the evaluation of the evidence of the respondent, her husband, the painter (P.W.2) and the appellant. In order to arrive at those facts she has had to assess the credibility of those witnesses by the advantage that was gained by seeing and hearing them. A study of the evidence *per se* is no adequate substitute for the gradual expression of that evidence by witnesses whom an appellate court cannot see or hear. All those incidents which enabled the learned magistrate to judge of the truth or materiality of the evidence are not reproduced in the record. The law applicable is tolerably clear. Before an appellate court is entitled to reject the learned magistrate's finding of fact based on credibility of witnesses, it must be shown that her evaluation of the evidence was wrong, and the onus that rests upon him is a heavy one: see *Tay Theng Hong* v. *Heap Moh Steamship Co.*[1] To my mind it has not been proved to my satisfaction that there was such an error on the face of the record.

Secondly, it was urged on behalf of the appellant that the learned magistrate erred in law in admitting the photographs as evidence without the production of the originals or calling the photographer who took them. I was informed that both parties were represented in the court below. The photographs had been admitted as exhibit P1 without any objection and in fact there was no record of any objection by appellant's counsel at that stage. A passage from the judgment of the Privy Council case of *Gopal Das* v. *Sri Thakurgi*[2] is a sufficient answer to counsel's argument. It reads: "Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof". That passage was applied and followed by the Court of Appeal in *Suppiah* v. *Ponnampalam.*[3]

Thirdly, it was argued that the learned magistrate erred in law in that the respondent had not provided strict proof of any tenancy agreement covering any express terms as to repairs to be effected by the appellant. In other words it was said that there was no specific finding by the learned magistrate of an express obligation to repair. A consideration of the respondent's claim shows that it was not based on an express term. The present case involves a monthly tenancy under a parol agreement and therefore it is reasonable to accept the absence of any express terms as to user. In the circumstances what are the implied terms incidental to such a tenancy? In my judgment one of them is the implied obligation to use the premises in a tenant-like manner. There exists a considerable body of judicial opinion on the matter. I propose in the first place to refer to a passage from 23 *Halsbury's* Laws of England (3rd ed.) at page 563.

> "In the absence of an express stipulation the liability of the tenant for the maintenance of the premises depends partly on the doctrine of waste, and partly on an implied contract to use the premises in a tenant-like manner".

In *Ferguson* v. *Anon.*,[4] Lord Kenyon said: "A tenant from year to year is bound to commit no waste, to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises". As was said by Bankes L.J. in *Marsden* v. *Edward Heyes Ltd.*[5] after referring to *Ferguson* v. *Anon., supra,* that means that if a tenant commits waste he must do such repairs as will enable them to exclude wind and water. It may be that he must restore them to the state they would be in if he had committed no waste, or deliver up premises as they were demised to him, fair wear and tear excepted. At any rate he must deliver up the premises of the same character as those which were demised to him, for example, a tenant who takes a dwelling-house cannot at the end of

the tenancy yield up a storehouse, or a stable, or cow-house. In other words, a tenant from year to year has an implied obligation to use the premises in a tenantlike manner. In *Horsefall* v. *Mather*,(6) an action of assumpsit against a tenant at will, Gibbs C.J. said that such a tenant was not liable for general repairs but added that the law implied a duty to use the premises in a husbandlike manner. Both these cases were referred to in the judgment of *Marsden* v. *Edward Heyes Ltd., supra.* In that case the demised premises consisted of a shop on the ground floor and a dwelling house on the top floor. It was found that the premises had been gutted by the tenants and there was nothing left except the four walls of the building; all the internal fixtures and fittings and some of the walls and grates had been removed. All the three learned judges were of the unanimous opinion that the tenants had completely altered the character of the demised premises and allowed the owner's claim. Bankes L.J. was of the opinion that "the law recognises a contractual obligation upon the defendants as tenants towards their landlord in reference to the user to which the premises were to be put and the extent to which they were to be maintained and repaired". He held the view that the facts led to the clear conclusion that there was a breach of that obligation. Scrutton L.J. held that "there is an implied contract of a tenant to use the premises in a tenant-like manner and to deliver them up at the end of the term". Atkin L.J. put the matter succintly at page 8:

> "....but no doubt the tenant would also be liable upon an obligation express or implied in the contract of tenancy. The contract of tenancy in the present case was oral, and contained no express obligation on the part of the tenants relating to their user of the premises, and so the question is whether there is an implied term in an oral agreement for a yearly tenancy that the tenant will abstain from such acts as to the defendants have committed in this case. But the cases....show that there is an obligation upon the tenant to use the premises in a tenant-like or, which is the same thing, a husband-like manner. It follows that he is under a continuing obligation to repair acts which would amount to voluntary waste and which involve a breach of the obligation to use the premises in a husbandlike manner."

When the tests as laid down in these cases are applied to the instant case it is clear that there is an implied contractual obligation upon the appellant to use the said premises in a tenant-like manner, and failure to observe it amounts to a breach of the obligation. Applying this principle of law to the facts as found by the learned magistrate it is without doubt that damage was done to the premises and therefore her conclusion was correct. The question being a question of law, the fact that the learned magistrate failed to indicate it in her judgment is not fatal to this appeal.

The final argument propounded by the appellant was that the learned magistrate had no jurisdiction to adjudicate upon the case as it involved a question of title. The appellant contended it was the case for the respondent that she was the legal owner of the premises while his case was based on the contention that the husband of the respondent was the legal owner. To my mind, such proposition was based on a misconception of the facts. The evidence disclosed that the respondent owned the premises but it was her husband who managed it, so much so that rent receipts were made in his name; on the strength of these facts it is not surprising to see that all negotiations for the letting of the premises were made by the husband, no doubt on behalf of his wife, and in this sense he was her agent. If this fact is not overlooked, a clear perspective is obtained. It appears to me perfectly clear that that was the position and therefore no question of title really comes into play. In the circumstances I am of the opinion that the judgment under appeal must be affirmed with costs to the respondent.

*Appeal dismissed.*

Solicitors: *Shearn, Delamore & Co.; Sothi & Ang.*

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## MALAYAN COMMERCIAL BANKS' ASSOCIATION v. NATIONAL UNION OF BANK EMPLOYEES (No. 1)

**[I.A.T. (Sir George Oehlers, Chairman; R.R. Chelliah, Chooi Mun Sou, Hanafiah bin Hussain and Koh Kim Leng, Members) September 2, 1965]**

**[K.L. — Industrial Arbitration Tribunal Case No. 3 of 1965]**

*Industrial relations — Promotion and transfer — Managerial rights.*

This trade dispute was referred to the tribunal by the Minister. The bank contended that its staff were challenging its right as management to effect a promotion and that its managerial rights to recruit and promote were unassilable. The bank sought directions by the tribunal that the bank had an exclusive discretion and responsibility in the discharge of its functions as an employer to promote and a discretion and responsibility in the discharge of its functions as an employer to transfer staff in accordance with the exigencies of its business. The attention of the tribunal was drawn to the following provisions of a collective agreement dated October 12, 1962 and made between the union and the Malayan Commercial Banks' Association:—

> *"Promotion*: Grade III employers are eligible to be considered for promotion to grade II on completion for their 8th year in grade III in the salary structure. When a bank considers a grade III 8th year employee will not merit promotion to grade II on completion of that year of service he will be informed accordingly. Each bank undertakes to re-examine any individual case which the union considers requires further investigation. Grade II employees will be eligible to be considered for promotion to grade I, as and when vacancy exists in a senior post of responsibility. It is agreed that each bank will review and decide on promotion annually.